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| APPLICATION NO.   | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------|------------------|
| 10/609,329  | 06/27/2003  | Troy D. Batterberry  | MS1-1479US          | 7914             |
| 22801   | 7590        | 02/07/2006           | EXAMINER            |                  |
| LEE & HAYES PLLC<br>421 W RIVERSIDE AVENUE SUITE 500<br>SPOKANE, WA 99201 |             |                      |                     | LAU, TUNG S      |
|   |             | ART UNIT             |                     | PAPER NUMBER     |
|   |             | 2863                 |                     |                  |

DATE MAILED: 02/07/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

|                              |                         |                     |  |
|------------------------------|-------------------------|---------------------|--|
| <b>Office Action Summary</b> | <b>Application No.</b>  | <b>Applicant(s)</b> |  |
|                              | 10/609,329              | BATTERBERRY ET AL.  |  |
|                              | Examiner<br>Tung S. Lau | Art Unit<br>2863    |  |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 23 January 2006.  
 2a) This action is FINAL.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-53 is/are pending in the application.  
 4a) Of the above claim(s) 1-15 and 24-37 is/are withdrawn from consideration.  
 5) Claim(s) 38-48 is/are allowed.  
 6) Claim(s) 16-23 and 49-53 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
     1. Certified copies of the priority documents have been received.  
     2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
     3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

|  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input checked="" type="checkbox"/> Interview Summary (PTO-413)          |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____.   |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>See office action</u> . | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
|  | 6) <input type="checkbox"/> Other: _____.                                   |

**DETAILED ACTION**

**Information Disclosure Statement**

1. Information Disclosure Statement filed on 01/23/2006 is acknowledged by the examiner; A copy of a signed PTO-1449 attached with this office action.

***Election/Restrictions***

***Combination/subcombination***

2. Restriction to one of the following inventions is required under 35 U.S.C. 121:
  - I. Claims 1-15 and 24-32 drawn to a method of receiving data without determine the rate of the streaming content, classified in class 702, subclass 79.
  - II. Claims 16-23, 38-48 and 49-53, drawn to automatic resume of data transmission after first transmission rate, classified in class 702, subclass 89.
  - III. Claims 33-37, drawn to a network interface with each multi-birate file stores in streaming content, classified in class 702, subclass 123.

The inventions are distinct, each from the other because of the following reasons:

Applicant's election with traverse of election on 09/21/2005 is acknowledged.

The traversal is on the ground(s) that reason 1-5 listed below. This is not found persuasive because:

Reason 1, applicants argue that restriction is not proper because the action was made before any action on the merits.

This is not persuasive, 37 CFR 1.142(a) state that the restriction may be made any time before final action, the action on 09/21/2005 clearly shows that the examiner contacted the applicant for election requirement according to PTO practice (see MPEP 810 [R-3]).

Reasons 2 and 3, applicants argue that restriction is not proper because is does not shown evidence of 'serious burden'.

Inventions of each of groups I-III are related as subcombinations disclosed as usable together in a single combination. The subcombinations are distinct from each other if they are shown to be separately usable. In the instant case, inventions can each be used for their respective uses has separate utility such as different way of getting transmission streaming data over the network. See MPEP § 806.05(d).

Invention I and II are related as combination (invention I) and subcombination (invention II). Inventions in this relationship are distinct if it can be shown that (1) the combination as claimed does not require the particular of the subcombinations as claimed for patentability, and (2) that the subcombination has utility by itself or in other combinations (MPEP § 806.05(c)). In the instant case, the combination as claimed does not require the particulars of the subcombination as claimed because Invention II, the combination as claimed does not required automatic resume of data transmission after first transmission

rate. The subcombination (invention II) has separate utility such as automatic resume of data transmission after first transmission rate.

Invention I and III are related as combination (invention I) and subcombination (invention III). Inventions in this relationship are distinct if it can be shown that (1) the combination as claimed does not require the particular of the subcombinations as claimed for patentability, and (2) that the subcombination has utility by itself or in other combinations (MPEP § 806.05(c)). In the instant case, the combination as claimed does not require the particulars of the subcombination as claimed because Invention III, the combination as claimed does not required network interface with each multi-birate file stores in streaming content. The subcombination (invention III) has separate utility such as network interface with each multi-birate file stores in streaming content.

Invention II and III are related as combination (invention II) and subcombination (invention III). Inventions in this relationship are distinct if it can be shown that (1) the combination as claimed does not require the particular of the subcombinations as claimed for patentability, and (2) that the subcombination has utility by itself or in other combinations (MPEP § 806.05(c)). In the instant case, the combination as claimed does not require the particulars of the subcombination as claimed because Invention III, the combination as claimed does not required network interface with each multi-birate file stores in streaming

content. The subcombination (invention III) has separate utility such as network interface with each multi-birate file stores in streaming content.

Because these inventions are distinct for the reasons given above and the search required for Group I is not required for Group II-III, restriction for examination purposes as indicated is proper.

Therefore, the argument is not persuasive, examining different class (702/79, 702/89 and 702/123) would required serious burden on the examination see MPEP § 806.05(c), see MPEP § 803).

Reason 4, applicants argue that restriction is not proper because the restriction will 'unduly burdensome on the applicant'.

The argument is not persuasive, because the decision of filling an application is/are depend on the applicant(s) and not PTO.

Reason 5, applicants argue that restriction is not proper because it will increase burden on the office.

The argument is not persuasive, because examining one class will not have a burden on the office (see MPEP § 806.05, MPEP § 803), but examining three different class (702/79, 702/89 and 702/123) would required serious burden on the examination (see MPEP § 803).

The requirement is still deemed proper and is therefore made FINAL.

Claims 1-15 and 24-32 and 33-37 stand withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention as noted in office action on 09/21/2005.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claim 16-23 and 49-53 are rejected under 35 U.S.C. 102(e) as being anticipated by Enns et al. (U.S. Patent 6,785,288).

Regarding claim 16:

Enns discloses a method, comprising: receiving a request from a client to stream content to the client at a first transmission rate streaming content to the client at the first transmission rate (fig. 4a, Col. 3-4, Lines 50-39); receiving a second request from the client to increase the streaming to a second transmission rate for a specified amount of content data (Col. 6-7, Lines 61-21); streaming the specified amount of content data to the client at the second transmission rate (Col. 6-7, Lines 61-21); and automatically resuming streaming content to the client at the first transmission rate (Col. 13, Lines 55-13).

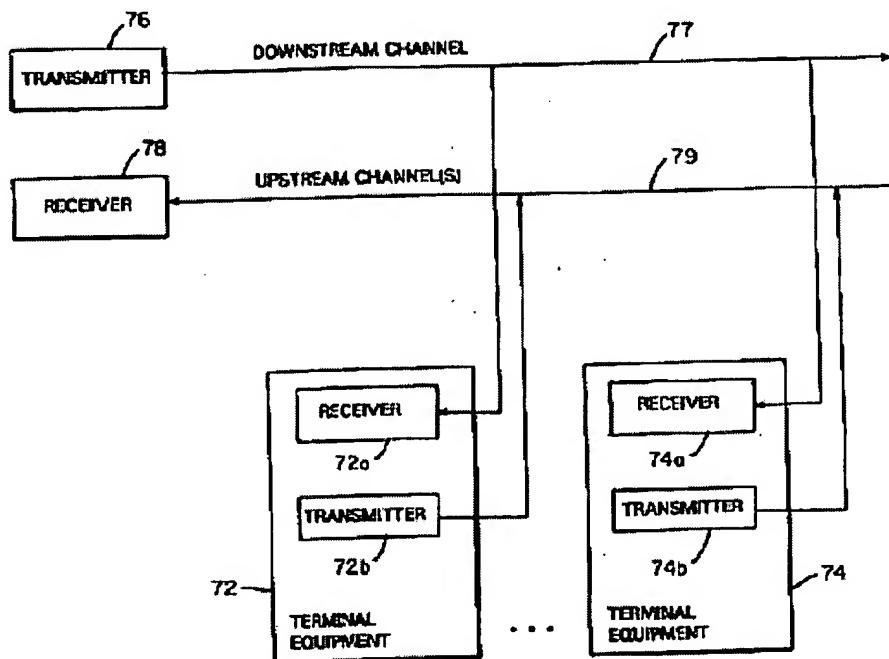


FIG. 4A

Regarding claim 49:

Enns discloses one or more computer-readable media containing computer-executable instructions that, when executed on a computer (abstract), perform

the following steps: transmitting content file data to a client over a network at a first transmission rate (fig. 4a, Col. 3-4, Lines 50-39); receiving a request from the client to transmit a particular amount of content file data to the client at a second transmission rate (Col. 6-7, Lines 61-21); transmitting the particular amount of content file data to the client at the second transmission rate (Col. 6-7, Lines 61-21); and automatically transmitting content file data subsequent to the particular amount of content file data to the client at the first transmission rate (Col. 13, Lines 55-13).

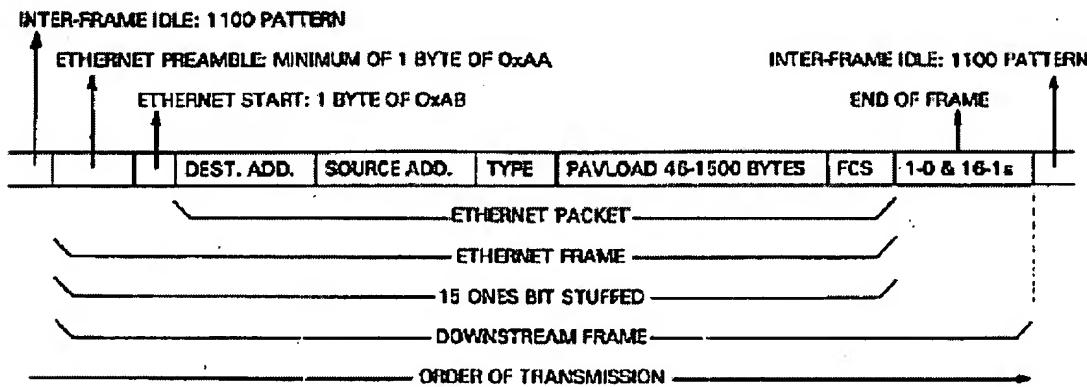


FIG. 4D

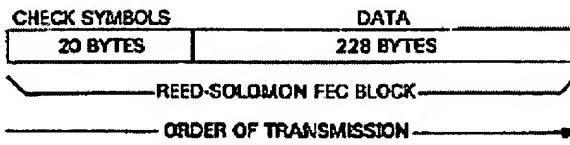


FIG. 4E

Regarding claim 17, Enns discloses providing an indication to the client of when the content streamed at the second transmission rate begins (fig. 4d, 4e);

Regarding claim 50, Enns discloses identifying content file data transmitted at the second transmission rate (fig. 4d, 4e); Regarding claims 18, 51, Enns discloses flagging the data package at the second transmission rate (fig. 4d, 4e, 4g);

Regarding claim 19, Enns discloses providing an indication to the client of when the content streamed at the second transmission rate concludes (fig. 4g);

Regarding claim 20, Enns discloses the specified amount of content data to be transmitted at the second transmission rate is identified as a number of seconds of content data (fig. 4d, 4e, 4g); Regarding claim 21, Enns discloses content data to be transmitted at the second transmission rate is identified as a number of data packets (fig. 4d, 4e, 4g); Regarding claim 22, Enns discloses content data to be transmitted at the second transmission rate is identified as a number of bytes of content data (fig. 4d, 4e, 4g); Regarding claim 23, Enns discloses receiving a request to stream remaining content at the second transmission rate (fig. 4d, 4e, 4g); and transmitting remaining streaming content at the second transmission rate (fig. 4d, 4e, 4g).

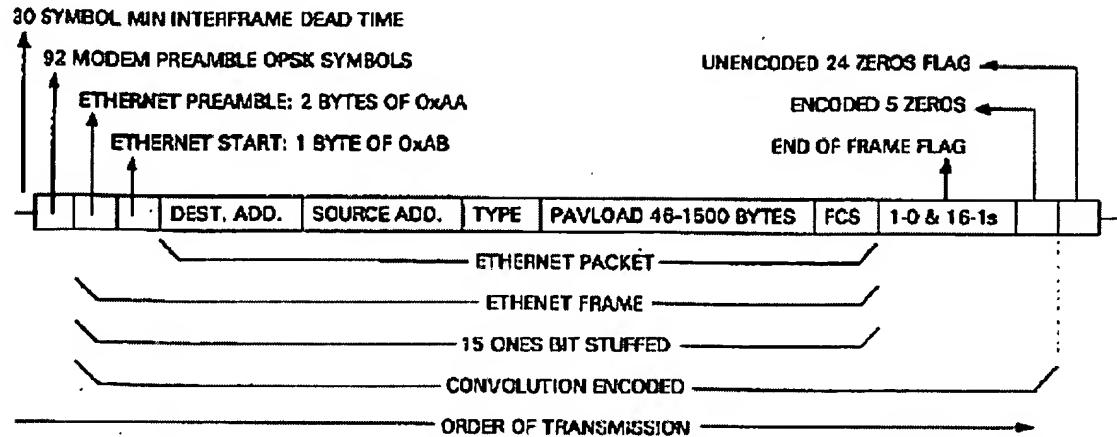


FIG. 4G

Regarding claim 52, Enns discloses flagging each data packet of content data transmitted at the second rate (fig. 4d, 4e, 4g); Regarding claim 53, Enns discloses beginning transmission of the content file data at a specified time (Col. 16, Lines 7-27).

***Allowable Subject Matter***

4. Claims 38-48 are allowed.

***Reasons for Allowance***

5. The following is an examiner's statement of reasons for allowance:

Independent claim 38 contains allowable subject matter. None of the prior art of record shows or fairly suggests the claimed invention.

Regarding claim 38:

The primary reason for the allowance of claim 38 is the inclusion computer-readable media containing computer-executable instructions that, when executed

on a computer including if the network can viably support transmission of the content data at the actual transmission rate, requesting the server to transmit subsequent content file data at a rate that is not greater than the actual transmission rate. It is these features found in the claim, as they are claimed in the combination, that has not been found, taught or suggested by the prior art of record which makes this claim allowable over the prior art.

Claims 39-48 are allowed due to their dependency on claim 38.

Any comments considered necessary by applicant must be submitted no later than the payment of the issue fee and, to avoid processing delays, should preferably accompany the issue fee. Such submissions should be clearly labeled "Comments on Statement of Reasons for Allowance."

***Response to Arguments***

6. Applicant's arguments with respect to the amended claims have been considered but are moot in view of the new ground(s) of rejection. However, applicant's arguments filed 01/23/2006 have been fully considered but they are not persuasive.
7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tung S Lau whose telephone number is 571-272-2274. The examiner can normally be reached on M-F 9-5:30. If attempts to

reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Barlow can be reached on 571-272-2269. The fax phone numbers for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

TL



  
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PRIMARY EXAMINER